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No. 83-740

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., *et al.*,
Petitioners,
v.
ROGER M. BALDWIN, *et al.*,
Respondents.

On Petition For a Writ Of Certiorari To The United
States Court Of Appeals For The Third Circuit

**BRIEF FOR RESPONDENT PHILADELPHIA
ELECTRIC COMPANY IN OPPOSITION**

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QUESTIONS PRESENTED

1. Did the district court err as a matter of law in receiving some, but not all, evidence proffered by petitioners *de novo* which was extrinsic to the administrative records of the respondent agencies in reviewing their decisions under the National Environmental Policy Act of 1969?

2. In considering prudent and feasible alternatives to mitigate any potential adverse effects to national historic landmarks under Section 110(f) of the National Historic Preservation Act, may an agency rely upon information developed by another federal agency in its separate review of the proposal?

INDEX

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	5
CONCLUSION	9

CITATIONS

CASES:	Page
<i>American Construction Co. v. Jacksonville, T & K.W.R. Co.</i> , 148 U.S. 372	5
<i>Camp v. Pitts</i> , 411 U.S. 138	6
<i>Cobbledick v. United States</i> , 309 U.S. 323	5
<i>Delaware Water Emergency Group v. Hansler</i> , 536 F. Supp. 26, <i>aff'd mem.</i> 681 F.2d 805	2, 3
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.</i> , 240 U.S. 251	5
<i>Henry v. FPC</i> , 513 F.2d 395	8
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390	7
<i>Silentman v. FPC</i> , 566 F.2d 237	8
<i>Strycker's Bay Neighborhood Council, Inc. v. Karlen</i> , 444 U.S. 223	6
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519	6
<i>Youngstown Sheet and Tube Co. v. Sawyer</i> , 343 U.S. 579	5
STATUTES AND REGULATIONS:	
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344	2
Judiciary and Judicial Procedure Act	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1
National Environmental Policy Act of 1969, 42 U.S.C. § 4332	2
National Historic Preservation Act	
16 U.S.C. § 470h-2(f)	2, 7
Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403	2
40 C.F.R. § 1506.3	8

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OPINION BELOW

The judgment order of the court of appeals is not reported.

JURISDICTION

The one-page judgment order of the court of appeals (Pet. App. 1a-2a) was entered on July 5, 1983. A petition for rehearing was denied in an order entered on August 2, 1983 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 31, 1983. Although petitioners invoked jurisdiction under 28 U.S.C. § 2101(c), which is not a jurisdictional provision, it appears that jurisdiction exists under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners seek review of a court of appeals judgment order affirming the district court's denial of a preliminary injunction. Petitioners had sought to halt construction of a privately sponsored water supply project in Point Pleasant, Pennsylvania. The project, which has required approval by a number of federal and State agencies, will provide supplemental cooling water for the Limerick Generating Station, a nuclear facility owned by respondent Philadelphia Electric Company ("PECO"), and will provide public drinking water for the service area of respondent Neshaminy Water Resources Authority ("NWRA").

In *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981), *aff'd mem.*, 681 F.2d 805 (3d Cir. 1982), the Eastern District of Pennsylvania and Third Circuit Court of Appeals had previously rejected similar claims challenging compliance by the Delaware River Basin Commission ("DRBC") with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332, and other statutes related to the protection of the environment and historic resources.¹ In this most recent challenge, petitioners attacked decisions by the United States Army Corps of Engineers² and DRBC, *inter alia*, alleging noncompliance with NEPA and Section 110(f) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(f).

¹ In 1981, DRBC gave formal approval to the project pursuant to Section 3.8 of its Compact.

² The Corps issued a "dredge and fill" permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, and Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344.

Each agency compiled a voluminous record in conducting its independent review of the project, including numerous scientific studies and comments from other agencies and interested members of the public. These well developed and authoritative records were certified to the district court.³ Both DRBC and the Corps of Engineers concluded that environmental impacts of the project would be minimal. Relying in part upon findings made by DRBC in its prior review as previously affirmed by the district court and court of appeals, the Corps of Engineers specifically determined that construction and operational impacts to the Delaware Canal, an historic landmark, would be temporary and insignificant. The Corps also determined that, given the overall evaluation of the project, the crossing of the Canal as proposed was the only "prudent and feasible alternative." Finally, the Corps found that adequate planning and precautions had been undertaken to ensure minimizing harm to the Canal.

The Corps of Engineers conducted a full review of the environmental impacts of the project, as well as its impacts upon area historic and archeological resources, but naturally focused most sharply upon impacts associated with the subject of its permit issuance. In other words, the Corps focused its concern on the construction and operation of the Point Pleasant pumping station and intake structure, including the structural changes in the Delaware Canal where the station's intake pipes would cross. In this regard, the Corps cooperated with the cognizable State authorities and the Advisory Council on Historic Preservation in evaluating potential impacts and implementing a Memorandum of Agreement among those

³ The certified record of the DRBC had previously been submitted in the *Delaware Water Emergency Group* case.

parties defining the terms and conditions necessary to eliminate and/or minimize any temporary damage to the Canal during construction.

Throughout its review, the Corps of Engineers met with petitioners and their legal counsel on several occasions to discuss their concerns. The Corps also considered the input of all concerned State and federal agencies as well as public commentators. The Corps studiously observed all applicable procedural requirements in affording public notice and participation in its decision-making process.

Petitioners below contended that the Corps should have considered distant sites for the project, but conceded that the Corps had considered alternative sites within the Point Pleasant area based upon a Corps consultant study submitted to the Advisory Council on Historic Preservation, the adequacy of which petitioners did not challenge below. Petitioners' argument that distant site alternatives should have been considered was specious and utterly impracticable. If required to build the station at a distant location, all of the exhaustive review conducted by federal, State, and local agencies since 1966 would have been negated. Such action would have necessitated respondents PECO and NWRA to seek further agency approvals and, inevitably, yet another round of environmental analysis. In any event, petitioners' argument is entirely academic given the Corps' finding that construction impacts would only be temporary and insignificant.

Under such circumstances, the Corps of Engineers properly found that distant sites were not "prudent and feasible," and the district court correctly determined that the Corps "did consider and gave great weight to the determination by DRBC, that Point Pleasant was the

proper site for the intake to accomplish the water supply permits which it had issued, pursuant to the entire history of the Point Pleasant project, including those matters which were before [the district court in the *Delaware Water Emergency Group* case]" (Pet. App. 20a-21a).

ARGUMENT

The judgment order of the court of appeals affirming the denial of a preliminary injunction is consistent with the governing statutes and, contrary to petitioners' assertion, presents no conflict with prior decisions of this Court or other courts of appeals.

1. Preliminarily, the questions raised by petitioners do not arise from a final judgment of the district court or court of appeals. This Court will not review an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). See also *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

There is no reason for the Court to review petitioners' issues on an interlocutory basis. Even if review were granted, the Court's consideration of the questions presented would be gratuitous. Petitioners would not in any event be entitled to a preliminary injunction because the district court found that they failed to satisfy the other requirements for preliminary relief apart from their failure to demonstrate a likelihood of success on the merits (Pet. App. 58a-59a).

2. Petitioners incorrectly assert that the district court erred as a matter of law in excluding testimony extrinsic to the administrative records of DRBC and the Corps of Engineers.⁴ In each agency proceeding petitioners were given a full opportunity to comment on the proposed project. Petitioners' objections were therefore included in the record and were fairly considered. In essence, petitioners desired a *de novo* hearing on their objections in order to challenge the wisdom of the agencies' substantive decision-making. Such review was clearly beyond the jurisdiction of the district court, as it properly recognized (Pet. App. 15a-16a).

As a general rule, a district court must limit its review to the agency's administrative record. *Camp v. Pitts*, 411 U.S. 138, 143 (1973). This rule is particularly apt in NEPA cases because NEPA sets forth only procedural requirements; substantive decision-making of the agency is not judicially reviewable. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228-29 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). In deciding whether judicial review under NEPA permits acceptance of extrinsic evidence, the courts have considered the comprehensiveness of the administrative record, the degree to which objectors were permitted to participate in its development, and the clarity with which the agency's rationale for its actions is explained. The exercise of the district court's discretion in evaluating these considerations provides no occasion for review by

⁴ The district court admitted some 84 exhibits proffered by petitioners. It made no finding that these documents should have been included in the administrative record, but considered them anyway.

this Court.⁵ In the case below, the records certified by the agencies were clearly sufficient to enable the district court to determine that the agencies had given a "hard look" at potential environmental impacts. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Petitioners, however, simply challenge the validity of the agency's technical and scientific findings, a role which the district court properly eschewed.

3. The question presented by petitioners under the National Historic Preservation Act involves a simple factual determination as to whether, in the language of Section 110(f) of the Act, the Corps of Engineers did, "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm" to the Delaware Canal.⁶ The district court's factual review of the Corps' consideration of other Canal crossing sites, based upon the study prepared by its consultant, information developed by DRBC in its separate review of the project, and consultation with the Advisory Council on Historic Preservation, provides no occasion for review by this Court.

The legal issue posed by petitioners is wholly contrived. Respondents below did not claim that the Corps was "bound" by any determination DRBC made under Section 110(f), but merely asserted, as the district court properly found, that the Corps "deferred to the DRBC" as to the determination of the appropriate point along the

⁵ As petitioners concede, the district court did consider the testimony of one witness as well as numerous documents extraneous to the record (Pet. 20).

⁶ Petitioners frame the issue similarly, i.e., whether the Corps failed "to identify, consider or adopt a canal crossing location which would minimize harm to the Canal" (Pet. 42).

Delaware River to divert its flows for the project "given [DRBC's] other determinations of river resources, basin resources and the needs for water in Bucks and Montgomery Counties, as well as for PECO at Limerick" (Pet. App. 19a). Inasmuch as the record fully supports the Corps' finding that adequate measures could be taken at the proposed Canal crossing to minimize any harm to the Canal, it was unnecessary for the Corps to consider geographically dispersed site alternatives that would, as a practical matter, eliminate the proposed project as already approved by DRBC. The fact that only insignificant and temporary impacts to the Canal would occur under the carefully analyzed procedures agreed upon by the federal agencies could not be ignored by the Corps of Engineers in concluding that other alternatives were not "prudent and feasible."

Thus, while the Corps properly relied in part upon DRBC's determination as to the appropriateness of the proposed project site, its reliance upon another agency's findings⁷ raises no significant question of continuing interest that warrants review by this Court.

⁷ It is well recognized that agencies may coordinate and cooperate with each other under NEPA and may rely upon previous agency findings. *Silentman, v. FPC*, 566 F.2d 237, 240 (D.C. Cir. 1977); *Henry v. FPC*, 513 F.2d 395, 407 (D.C. Cir. 1975). See 40 C.F.R. § 1506.3

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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